

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

**RESERVED ON : 19th DECEMBER, 2017
DECIDED ON : 8th JANUARY, 2018**

+ FAO 466/2017 & CM 42585/17
MUKESH KUMAR Appellant
Through : Mr.Aman Mehta, Advocate.

versus

PARVEEN KUMAR Respondent
Through : None.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Present appeal has been preferred by the appellant – Mukesh Kumar to impugn an order dated 18.09.2017 of learned Addl. District Judge whereby his application under Order IX Rule 13 CPC was dismissed being barred by limitation.

2. Notice of the appeal was given to the respondent. The respondent did not opt to appear despite service and was proceeded ex-parte.

3. I have heard learned counsel for the appellant and have examined the file. It is not at issue that the respondent had filed a suit for recovery of ₹3,93,546.15/- against the appellant on 06.01.2016. The appellant did not appear in the said suit despite service and was proceeded ex-parte. The case was finally decreed by the Trial Court

on 06.09.2016. The respondent thereafter filed execution petition and pursuant to that at one stage the appellant's brother issued a cheque in the sum of ₹3 lacs for satisfaction of the decretal amount. However, on presentation, the said cheque was dishonoured.

4. Subsequently, the appellant filed an application under Order IX Rule 13 CPC for setting aside the ex-parte order along with an application under Section 5 of Limitation Act for condonation of delay. The said application was contested by the respondent. By the impugned order, the learned Trial Court dismissed the said application and declined to condone the delay.

5. Needless to say, the appellant was negligent in contesting the civil suit and despite being aware of the pendency of the suit, he did not bother to appear before the Court to contest it. The appellant's case is that he had engaged Mr.I.J.S.Ahluwalia, Advocate in the said suit and he had assured him to take care of his case. However, subsequently he came to know that Mr.I.J.S.Ahluwalia, Advocate did not put appearance in the case. These submissions are without any foundation. No document has been placed on record whereby Mr.I.J.S.Ahluwalia, Advocate was engaged to appear as a counsel in the civil suit. Moreover, it was the duty of the appellant to contact his counsel to know the status of the proceedings in the civil suit; which was not done.

6. At the same time, it has come on record that the respondent had also initiated proceedings under Section 138 Negotiable Instruments Act against the appellant which were being regularly attended by him. It is not at dispute that in revision petition,

the said dispute under Section 138 Negotiable Instruments Act was settled on 04.03.2017 and a sum of ₹2.5 lacs was paid to the respondent. I have examined the orders in C.R. No.2/2017 where both the parties along with their counsel had put appearance and recorded their statements. The respondent for the reason known to him did not disclose that civil proceedings were pending against the appellant and he had already got an ex-parte decree. The execution petition was filed by the respondent for claiming the entire decretal amount without informing the executing Court about the receipt of ₹2.5 lacs in the revision petition pertaining to the same transaction. Apparently, the respondent concealed material facts at the time of settlement before the revisional Court as well as at the time of filing the execution proceedings. The appellant who was regularly appearing in 138 Negotiable Instruments Act proceedings had no reasons not to contest the civil suit. Appellant's absence prima facie in the civil proceedings appears unintentional. The appellant has given plausible reasons for delay in filing the application for setting aside the ex-parte orders as he came to know about it when warrant of attachment issued for the recovery of the decretal amount was issued and cheque for a sum of ₹3 lacs by his brother was given, he came to know that the ex-parte decree was still in force.

7. Adverse inference is to be drawn against the respondent for not contesting the present appeal despite service.

8. In the interest of justice and to enable the appellant to get his case decided on merits, the delay in filing the application under Order IX Rule 13 CPC is condoned.

9. The appeal is allowed and the impugned order is set aside.

10. The parties shall appear before the Trial Court on 24th January, 2018 for disposal of the application under Order IX Rule 13 CPC on merits.

11. Observations in the order shall have no impact on merits of the case.

12. Trial Court record be sent back forthwith with the copy of the order.

13. Pending application also stands disposed of.

JANUARY 08, 2018 / tr

**(S.P.GARG)
JUDGE**